
REMOVAL—FILL LAW

ORS 196.800 — 196.990

*and Removal and Filling
in Scenic Waterways*

ORS 390.805 — 390.925

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Removal—Fill Law

REMOVAL OF MATERIAL; FILLING

Note: Section 2, chapter 45, Oregon Laws 1989, provides:

Sec. 2. (1) Notwithstanding any other provision of ORS 541.605 to 541.685 [renumbered 196.800 to 196.900 in 1989]:

(a) As used in ORS 541.605 to 541.685 [renumbered 196.800 to 196.900 in 1989], "fill" means the deposit by artificial means of material in any waters of this state.

(b) In the manner provided by ORS 541.640 [196.850], the director may provide a general exception from the application of ORS 541.605 to 541.685 [renumbered 196.800 to 196.900 in 1989] for fills that involve less than 50 cubic yards of material and will not result in substantial harm to the water resources of this state.

(2) This section does not become operative until the federal Environmental Protection Agency grants authority to the Division of State Lands to administer permits for the discharge of dredged or fill material under Section 404 of the Federal Water Pollution Control Act (P.L. 92-500, as amended). [1989 c.45 §2]

196.800 Definitions for ORS 196.600 to 196.665 and 196.800 to 196.900. As used in ORS 196.600 to 196.665 and 196.800 to 196.900, unless the context requires otherwise:

(1) "Channel relocation" means a change in location of a channel in which a new channel is dug and the flow is diverted from the old channel into the new channel if more than 50 cubic yards of material is removed in constructing the new channel or if it would require more than 50 cubic yards of material to completely fill the old channel.

(2) "Director" means the Director of the Division of State Lands.

(3) "Division" means the Division of State Lands.

(4) "Estuary" means a body of water semienlosed by land and connected with the open ocean within which salt water is usually diluted by fresh water derived from the land. "Estuary" includes all estuarine waters, tidelands, tidal marshes and submerged lands extending upstream to the head of tidewater. However, the Columbia River Estuary extends to the western edge of Puget Island.

(5) "Fill" means the total of deposits by artificial means equal to or exceeding 50 cubic yards or more of material at one location in any waters of this state.

(6) "General authorization" means a rule adopted by the director authorizing, without a permit from the division, a category of activities involving removal or fill, or both, on a state-wide or other geographic basis.

(7) "Governmental body" includes the Federal Government when operating in any

capacity other than navigational servitude, the State of Oregon and every political subdivision therein.

(8) "Intermittent stream" means any stream which flows during a portion of every year and which provides spawning, rearing or food-producing areas for food and game fish.

(9) "Material" means rock, gravel, sand, silt and other inorganic substances removed from waters of this state and any materials, organic or inorganic, used to fill waters of this state.

(10) "Mitigation" means the reduction of adverse effects of a proposed project by considering, in the following order:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action;

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation;

(c) Rectifying the impact by repairing, rehabilitating or restoring the affected environment;

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action by monitoring and taking appropriate corrective measures; and

(e) Compensating for the impact by replacing or providing comparable substitute wetland or water resources.

(11) "Public use" means a publicly owned project or a privately owned project that is available for use by the public.

(12) "Removal" means the taking of more than 50 cubic yards or the equivalent weight in tons of material in any waters of this state in any calendar year; or the movement by artificial means of an equivalent amount of material on or within the bed of such waters, including channel relocation.

(13) "Water resources" includes not only water itself but also aquatic life and habitats therein and all other natural resources in and under the waters of this state.

(14) "Waters of this state" means natural waterways including all tidal and nontidal bays, intermittent streams, constantly flowing streams, lakes, wetlands and other bodies of water in this state, navigable and nonnavigable, including that portion of the Pacific Ocean which is in the boundaries of this state.

(15) "Wetland conservation plan" means a written plan providing for wetland management containing a detailed and compre-

hensive statement of policies, standards and criteria to guide public and private uses and protection of wetlands, waters and related adjacent uplands and which has specific implementing measures and which apply to designated geographic areas of the State of Oregon.

(16) "Wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. [Formerly 541.605 and then 196.670]

196.805 Policy. (1) The protection, conservation and best use of the water resources of this state are matters of the utmost public concern. Streams, lakes, bays, estuaries and other bodies of water in this state, including not only water and materials for domestic, agricultural and industrial use but also habitats and spawning areas for fish, avenues for transportation and sites for commerce and public recreation, are vital to the economy and well-being of this state and its people. Unregulated removal of material from the beds and banks of the waters of this state may create hazards to the health, safety and welfare of the people of this state. Unregulated filling in the waters of this state for any purpose, may result in interfering with or injuring public navigation, fishery and recreational uses of the waters. In order to provide for the best possible use of the water resources of this state, it is desirable to centralize authority in the Director of the Division of State Lands, and implement control of the removal of material from the beds and banks or filling of the waters of this state.

(2) The Director of the Division of State Lands shall take into consideration all beneficial uses of water including streambank protection when administering fill and removal statutes.

(3) There shall be no condemnation, inverse condemnation, other taking, or confiscating of property under ORS 196.600 to 196.665 and 196.800 to 196.900 without due process of law. [Formerly 541.610 and then 196.675]

196.810 Permit required to remove material from bed or banks of waters; exceptions. (1) Except as otherwise specifically permitted under ORS 196.600 to 196.665 and 196.800 to 196.900, no person or governmental body shall remove any material from the beds or banks or fill any waters of this state without a permit issued under authority of the Director of the Division of State Lands, or in a manner contrary to the conditions set out in the permit, or in a manner contrary to the conditions set out in

an order approving a wetlands conservation plan.

(2) No governmental body shall issue a lease or permit contrary or in opposition to the conditions set out in the permit issued under ORS 196.600 to 196.665 and 196.800 to 196.900.

(3) Subsection (1) of this section does not apply to removal of material under a contract, permit or lease with any governmental body entered into before September 13, 1967. However, no such contract, permit or lease may be renewed or extended on or after September 13, 1967, unless the person removing the material has obtained a permit under ORS 196.600 to 196.665 and 196.800 to 196.900.

(4) Subsection (1) of this section does not apply to removal of material from the beds or banks or filling of any waters of this state in an emergency, for the purpose of making repairs or for the purpose of preventing irreparable harm, injury or damage to persons or property, when notice of such emergency removal or filling is given to the Division of State Lands within 24 hours following the start of such activity. The division, not later than 24 hours following notice, shall inspect the emergency activity, and deny or approve; provided, however, that in emergency actions involving highways, the appropriate highway authority having jurisdiction over the highway in which the work is being performed, shall notify the division within 72 hours following the start of such activity. [Formerly 541.615 and then 196.680]

196.815 Application for permit; fees; disposition of fees. (1) Each applicant for a permit to remove material from the bed or banks or fill any waters of this state first shall file a written application with the Director of the Division of State Lands, specifying the nature and amount of material to be removed or the amount of fill, the waters and the specific location from which it is to be removed or where the fill will be placed, the method of removal or filling and the times during which removal or filling is to be conducted. The director may require additional information as is necessary to enable the director to determine whether the granting of the permit applied for is consistent with the protection, conservation and best use of the water resources of this state. For the purposes of this subsection, fills or removals of material at locations not more than one mile apart may be combined in one application.

(2) The Director of the Division of State Lands shall furnish to any member of the public upon written request and at the expense of the member of the public a copy of

any application for a permit pursuant to subsection (1) of this section.

(3)(a) Each application under subsection (1) of this section must be accompanied by a base fee in accordance with the following schedule:

(A) For a removal by a private operator, or a person contracting to perform services for a private operator, \$50.

(B) For a removal by a public body, \$150.

(C) For a removal by a commercial operator, \$150.

(D) For a fill by a private operator, or a person contracting to perform services for a private operator, \$150.

(E) For a fill by a public body, \$375.

(F) For a fill by a commercial operator, \$375.

(G) For erosion—flood repair, including riprap, by a private landowner or public body, or a person contracting to perform services for such persons, no fee.

(b) In addition to the base fee for removal established under paragraph (a) of this subsection, each applicant shall also pay as part of the application fee the following fee based on the volume of removal material:

(A) Less than 500 cubic yards, no volume fee.

(B) 500 to 4,999 cubic yards, \$75 for private operator, \$75 for public body and \$75 for commercial operator.

(C) 5,000 to 50,000 cubic yards, \$150 for private operator, \$150 for public body and \$150 for commercial operator.

(D) Over 50,000 cubic yards, \$225 for private operator, \$225 for public body and \$225 for commercial operator.

(c) In addition to the base fee for fill established under paragraph (a) of this subsection, each applicant shall also pay as part of the application fee the following fee based on the volume of fill material:

(A) Less than 500 cubic yards, no volume fee.

(B) 500 to 2,999 cubic yards, \$75 for private operator, \$75 for public body and \$75 for commercial operator.

(C) 3,000 to 10,000 cubic yards, \$150 for private operator, \$150 for public body and \$150 for commercial operator.

(D) Over 10,000 cubic yards, \$225 for private operator, \$225 for public body and \$225 for commercial operator.

(d) For the purposes of this subsection, the following terms shall have the following meanings:

(A) "Private operator" means any person

undertaking a project for exclusively a nonincome-producing and nonprofit purpose;

(B) "Public body" means federal, state, and local governmental bodies, unless specifically exempted by law, engaged in projects for the purpose of providing free public services;

(C) "Commercial operator" means any person undertaking a project having financial profit as a goal;

(D) "Riprap" means the facing of a streambank with rock or similar substance to control erosion in accordance with regulations promulgated by the division; and

(E) "Erosion—flood repair" means riprap or any other work necessary to preserve existing facilities and land from flood and high stream flows, in accordance with regulations promulgated by the division.

(4) For each application that involves both removal and filling, the application fee assessed shall be either for removal or filling, whichever is higher according to the fee schedule in subsection (3) of this section.

(5) Annually on the anniversary date of the permit, each holder of a material removal or fill permit shall pay a fee during the term of the permit in accordance with the schedule set forth in subsection (3) of this section, except that the applicant shall pay only the base fee. The permit shall be suspended during any period of delinquency of payment as though no permit was applied for. Notwithstanding this subsection the director may, before granting any extension of the permit, require the permittee to show that the continued exercise of the permit is consistent with the protection, conservation and best use of the water resources of this state.

(6) Fees received under this section shall be credited to the Common School Fund for use by the division in administration of ORS 196.600 to 196.665, 196.800 to 196.900, 196.990 and 541.990 and as otherwise required by law. [Formerly 541.620 and then 196.685]

196.820 Prohibition against issuance of permits to fill Smith Lake or Bybee Lake; exception. (1) Notwithstanding any provision of ORS 196.600 to 196.665 and 196.800 to 196.900 to the contrary, except as provided in subsection (2) of this section, the Director of the Division of State Lands shall not issue any permit to fill Smith Lake or Bybee Lake, located in Multnomah County, below the contour line which lies 11 feet above mean sea level as determined by the 1947 adjusted United States Coastal Geodetic Survey Datum.

(2) Notwithstanding the provision of subsection (1) of this section, the Director of the Division of State Lands may issue a permit

to fill Smith Lake or Bybee Lake, located in Multnomah County, if such fill is to enhance or maintain fish and wildlife habitat at or near Smith Lake or Bybee Lake. A fill shall be considered to be for the purpose of enhancing or maintaining fish and wildlife habitat if the proposed fill is approved by the State Department of Fish and Wildlife. [Formerly 541.622 and then 196.690]

196.825 Conditions of permit; consultation with other agencies; hearing; appeal. (1) The director shall issue a permit to remove material from the beds or banks of any waters of this state applied for under ORS 196.815 if the director determines that the removal described in the application will not be inconsistent with the protection, conservation and best use of the water resources of this state as specified in ORS 196.805.

(2) The director shall issue a permit applied for under ORS 196.815 for filling waters of this state if the director determines that the proposed fill would not unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation.

(3) In determining whether or not a permit shall be issued, the director shall consider the following:

(a) The public need for the proposed fill and the social, economic or other public benefits likely to result from the proposed fill. When the applicant for a fill permit is a public body, the director may accept and rely upon the public body's findings as to local public need and local public benefit.

(b) The economic cost to the public if the proposed fill is not accomplished.

(c) The availability of alternatives to the project for which the fill is proposed.

(d) The availability of alternative sites for the proposed fill.

(e) Whether the proposed fill conforms to sound policies of conservation and would not interfere with public health and safety.

(f) Whether the proposed fill is in conformance with existing public uses of the waters and with uses designated for adjacent land in an acknowledged comprehensive plan and zoning ordinances.

(g) Whether the proposed fill is compatible with the acknowledged comprehensive plan and land use regulations for the area where the proposed fill is to take place.

(h) Whether the proposed fill is for streambank protection.

(4) The director may issue a permit for a substantial fill in an estuary for a nonwater dependent use only if the fill is for a public use and would satisfy a public need that outweighs harm to navigation, fishery and

recreation and if the proposed fill meets all other criteria contained in ORS 196.600 to 196.665 and 196.800 to 196.900.

(5) If the director issues a permit, the director may impose such conditions as the director considers necessary to carry out the purposes of ORS 196.805, 196.830 and subsections (1) and (2) of this section. In formulating such conditions the director may consult with the State Geologist, the State Fish and Wildlife Director, the State Forester, the Director of the Department of Environmental Quality, the administrative officer of the State Soil and Water Conservation Commission, the Director of Agriculture, the State Parks and Recreation Director, the State Marine Director, the State Highway Engineer, the Director of the Economic Development Department, the Water Resources Director and affected local governmental units. Each permit is valid only for the time specified therein. Obtaining a lease from the Division of State Lands shall not be one of the conditions to be considered in granting a permit under ORS 196.815. The director shall impose, as conditions to any permit, general authorization or wetland conservation plan, measures to provide mitigation for the reasonably expected adverse impacts from project development.

(6) Any applicant whose application for a permit has been denied, or who objects to any of the conditions imposed under subsections (1), (2) and (5) of this section by the director, may, within 10 days of the denial of the permit or the imposition of any condition, request a hearing from the director. Thereupon the director shall set the matter down for hearing, which shall be conducted as a contested case in accordance with ORS 183.415 to 183.430, 183.440 to 183.460 and 183.470. After such hearing, the director shall enter an order containing findings of fact and conclusions of law. The order shall rescind, affirm or modify the director's initial order. Appeals from the director's final order may be taken to the Court of Appeals in the manner provided by ORS 183.482.

(7) In the event that a decision on issuance of a permit by the Director of the Division of State Lands is delayed for a period exceeding 45 days from the date of application in the case of a removal, or 90 days from the date of application in the case of a fill, a temporary permit shall be issued pending such final decision.

(8) Permits issued under this section shall be in lieu of any permit that might be required for the same operation under ORS 164.775, 164.785, 468.010, 468.030 to 468.045, 468.055, 468.060, 468.075, 468.110, 468.120, 468.700 to 468.725 and 468.735 to 468.775, so long as:

(a) The operation is that for which the permit is issued; and

(b) The standards for granting such permits are substantially the same as those established pursuant to ORS 164.775, 164.785, 468.010, 468.035, 468.040, 468.055, 468.110, 468.120, 468.700 to 468.725 and 468.735 to 468.775 to the extent they affect water quality.

(9) Any agency or other unit of government requested by the director to comment on an application for a permit under this section must submit its comments to the director within 45 days after receiving the request for comment. If an agency or other unit of government fails to comment on the application within 45 days, the director shall assume the agency or other unit of government has no objection and shall approve or deny the application. [Formerly 541.625 and then 196.695]

196.830 Estuarine resource replacement as condition for fill or removal from estuary; considerations; other permit conditions. (1) As used in this section, "estuarine resource replacement" means the creation, restoration or enhancement of an estuarine area to maintain the functional characteristics and processes of the estuary, such as its natural biological productivity, habitats and species diversity, unique features and water quality.

(2) Except as provided in subsection (4) of this section, the director shall require estuarine resource replacement as a condition of any permit for filling or removal of material from an intertidal or tidal marsh area of an estuary.

(3) If the director requires estuarine resource replacement, the director shall consider:

(a) The identified adverse impacts of the proposed activity;

(b) The availability of areas in which replacement activities could be performed;

(c) The provisions of land use plans for the area adjacent to or surrounding the area of the proposed activity;

(d) The recommendations of any interested or affected state or local agencies; and

(e) The extent of compensating activity inherent in the proposed activity.

(4) Notwithstanding any provisions of this chapter and ORS chapter 197 or the state-wide planning goals adopted thereunder to the contrary, the director may:

(a) Waive estuarine resource replacement in part for an activity for which replacement would otherwise be required if, after consultation with appropriate state and local agencies the director determines that:

(A) There is no alternative manner in which to accomplish the purpose of the project;

(B) There is no feasible manner in which estuarine resource replacement could be accomplished;

(C) The economic and public need for the project and the economic and public benefits resulting from the project clearly outweigh the potential degradation of the estuary;

(D) The project is for a public use; and

(E) The project is water dependent or the project is publicly owned and water related; or

(b) Waive estuarine resource replacement wholly or in part for an activity for which replacement would otherwise be required if the activity is:

(A) Filling for repair and maintenance of existing functional dikes and negligible physical or biological damage to the tidal marsh or intertidal areas of the estuary will result;

(B) Riprap to allow protection of an existing bankline with clean, durable erosion resistant material when a need for riprap protection is demonstrated that cannot be met with natural vegetation and no appreciable increase in existing upland will occur;

(C) Filling for repair and maintenance of existing roads and negligible physical or biological damage to the tidal marsh or intertidal areas of the estuary will result;

(D) Dredging for authorized navigation channels, jetty or navigational aid installation, repair or maintenance conducted by or under contract with the Army Corps of Engineers;

(E) Dredging or filling required as part of an estuarine resource restoration or enhancement project agreed to by local, state and federal agencies; or

(F) A proposed alteration that would have negligible adverse physical or biological impact on estuarine resources.

(5) Nothing in this section is intended to limit the authority of the director to impose conditions on a permit under ORS 196.825 (4). [Formerly 541.626 and then 196.700]

196.835 Hearing regarding issuance of permit; procedure; appeals; suspension of permit pending appeal. Any person aggrieved or adversely affected by the director's grant of a permit may file a written request for hearing with the director within 60 days after the date the permit was granted. If the director finds that the person making the written request has a legally protected interest which is adversely affected by the grant of the permit, the director shall set the matter down for hearing within 30 days after

receipt of the request. The hearing shall be conducted as a contested case in accordance with ORS 183.415 to 183.430, 183.440 to 183.460 and 183.470. The permittee shall be a party to the proceeding. Within 45 days of the hearing the director shall enter an order containing findings of fact and conclusions of law. The order shall rescind, affirm or modify the director's original order. Appeals from the director's final order may be taken to the Court of Appeals in the manner provided by ORS 183.482. A permit to fill granted by the director may be suspended by the director during the pendency of the proceedings before the director and any appeal. The director shall not suspend the permit unless the person aggrieved or adversely affected by grant of permit makes a showing before the director by clear and convincing evidence that commencement or continuation of the fill would cause irreparable damage and would be inconsistent with ORS 196.600 to 196.665 and 196.800 to 196.900. [Formerly 541.627 and then 196.705]

196.840 Closure of specified waters to removal or filling. Any agency listed in ORS 196.825 (5) may request the Water Resources Commission by rule to close one or more specified waters of this state to the issuance of permits. After a public hearing held in conformity with ORS 183.310 to 183.550, if the Water Resources Commission finds that issuance of permits with respect to such water resources would be inconsistent with the protection, conservation and best use of the water resources of this state as specified in ORS 196.805, the Water Resources Commission may by rule close such waters to the issuance of permits and to any other removals or fills under ORS 196.850 for an indefinite period or during such other times as are stated in the rule. [Formerly 541.630 and then 196.710]

196.845 Investigations and surveys. In considering applications for permits, the Director of the Division of State Lands may cause investigations or surveys to be made of the location of the work contemplated to determine whether such removal or filling is consistent with ORS 196.805 and 196.825. [Formerly 541.635 and then 196.715]

196.850 Waiving permit requirement in certain cases; notice; review. (1) Notwithstanding ORS 196.810, the division may, by rule, grant general authorization for removal of material from the bed or banks or the filling of any waters of the state without a permit from the division if the division finds that those activities subject to the general authorization are substantially similar in nature and would cause only minimal individual and cumulative environmental impacts, and would not result in long-term harm to water resources of the state. The division

shall condition any such general authorization upon actions necessary to minimize environmental impacts.

(2) The division shall provide notice of any proposed general authorization to affected federal and state agencies, local governments and the public. The notice shall include:

(a) A clear description of the proposal; and

(b) Draft findings and any proposed conditions pursuant to subsection (1) of this section.

(3) Any person proposing to conduct an action under a general authorization shall notify the division in writing prior to conducting such action.

(4) The division shall amend or rescind any general authorization upon a determination that the activities conducted under the authorization have resulted in or would result in more than minimal environmental impacts or long-term harm to the water resources of this state.

(5) The division shall review each general authorization adopted pursuant to this section every five years. The review shall include public notice and opportunity for public hearing. After such review, the division may either modify, reissue or rescind the general authorization.

(6) In addition to the grounds for review set forth in ORS 183.400 (4), on judicial review of the validity of a rule adopted under this section, the rule shall be reviewable for substantial evidence in the rulemaking record. The record shall include copies of all documents before the agency relevant to whether the requirement of subsection (1) of this section has been met. [1989 c.837 §9 (enacted in lieu of 541.640); renumbered 196.850 in 1989]

196.855 Noncomplying removal of material or filling constitutes public nuisance. The removal of material from the beds or banks or filling any of the waters of this state without a permit issued under ORS 196.825, or in a manner contrary to the conditions set out in the permit, or in a manner contrary to the conditions set out in an order approving a wetlands conservation plan, is a public nuisance. [Formerly 541.645 and then 196.720]

196.860 Enforcement powers of director. (1) If the director determines that material is being removed from or filling is occurring in any of the waters of this state without a permit issued under ORS 196.825, or in a manner contrary to the conditions set out in the permit, or in a manner contrary to the conditions set out in an order approving a wetlands conservation plan, the director may:

(a) Investigate, hold hearings, make orders and take action, as provided in ORS 196.600 to 196.665 and 196.800 to 196.900, as soon as possible.

(b) For the purpose of investigating conditions relating to such removal or filling, through the employees or the duly authorized representatives of the division, enter at reasonable times upon any private or public property.

(c) Conduct public hearings in accordance with ORS 183.310 to 183.550.

(d) Publish findings and recommendations as they are developed relative to public policies and procedures necessary for the correction of conditions or violations of ORS 196.600 to 196.665 and 196.800 to 196.900.

(e) Give notice of any proposed order relating to a violation by personal service or by mailing the notice by registered or certified mail to the person or governmental body affected. Any person aggrieved by a proposed order of the director may request a hearing within 20 days of the date of personal service or mailing of the notice. Hearings shall be conducted under the provisions of ORS 183.310 to 183.550 applicable to contested cases, and judicial review of final orders shall be conducted in the Court of Appeals according to ORS 183.482. If no hearing is requested or if the party fails to appear, a final order shall be issued upon a prima facie case on the record of the agency.

(f) Take appropriate action for the enforcement of any rules or final orders. Any violation of ORS 196.600 to 196.665 and 196.800 to 196.900 or of any rule or final order of the director under ORS 196.600 to 196.665 and 196.800 to 196.900 may be enjoined in civil abatement proceedings brought in the name of the State of Oregon; and in any such proceedings the director may seek and the court may award a sum of money sufficient to compensate the public for any destruction or infringement of any public right of navigation, fishery or recreation resulting from such violation. Proceedings thus brought by the director shall set forth if applicable the dates of notice and hearing and the specific rule or order of the director, together with the facts of noncompliance, the facts giving rise to the public nuisance, and a statement of the damages to any public right of navigation, fishery or recreation, if any, resulting from such violation.

(2) In addition to the administrative action the director may take under subsection (1) of this section, the director may enter an order requiring any person to cease and desist from any violation if the director determines that such violation presents an imminent and substantial risk of injury, loss or damage to water resources.

(a) An order under this subsection:

(A) May be entered without prior notice or hearing.

(B) Shall be served upon the person by personal service or by registered or certified mail.

(C) Shall state that a hearing will be held on the order if a written request for hearing is filed by the person subject to the order within 10 days after receipt of the order.

(D) Shall not be stayed during the pendency of a hearing conducted under paragraph (b) of this subsection.

(b) If a person subject to an order under this subsection files a timely demand for hearing, the director shall hold a contested case hearing according to the applicable provisions of ORS 183.310 to 183.550. If the person fails to request a hearing, the order shall be entered as a final order upon prima facie case made on the record of the agency.

(c) Neither the director nor any duly authorized representative of the division shall be liable for any damages a person may sustain as a result of a cease and desist order issued under this subsection.

(d) The state and local police shall cooperate in the enforcement of any order issued under this subsection and shall require no further authority or warrant in executing or enforcing such order. If any person fails to comply with an order issued under this subsection, the circuit court of the county in which the violation occurred or is threatened shall compel compliance with the director's order in the same manner as with an order of that court.

(3) As used in this section, "violation" means removing material from or placing fill in, any of the waters of this state without a permit or in a manner contrary to the conditions set out in a permit issued under ORS 196.825. [Formerly 541.650 and then 196.725]

196.865 Revocation, suspension or refusal to renew permit. If the director finds that a person or governmental body holding a permit issued under ORS 196.825 is removing material from the bed or banks or filling any of the waters of this state contrary to the conditions set out in the permit, the director may revoke, suspend or refuse to renew such permit. The director may revoke a permit only after giving notice and opportunity for a hearing as provided in ORS 183.415 to 183.430, 183.440 to 183.460 and 183.470. [Formerly 541.655 and then 196.730]

196.870 Abatement proceedings; restraining order; injunction; public compensation. (1) In addition to any enforcement action taken under ORS 196.860, civil proceedings to abate alleged public nui-

sances under ORS 196.855 may be instituted at law or in equity, in the name of the State of Oregon, upon relation of the Director of the Division of State Lands or by any person in the person's name.

(2) Before beginning any action under subsection (1) of this section, a person other than the director shall provide 60 days notice to the director of the intended action. A person other than the director may not begin an action under subsection (1) of this section if the director has commenced and is diligently prosecuting civil, criminal or administrative proceedings in the same matter.

(3) The director may institute an action in the name of the State of Oregon for a temporary restraining order or preliminary injunction if a threatened or existing nuisance under ORS 196.855 creates an emergency that requires immediate action to protect the public health, safety or welfare. The director shall not be required to furnish a bond in such proceeding.

(4) The State Land Board, the Director of the Division of State Lands and the employees or duly authorized representatives of the division shall not be liable for any damages a defendant may sustain as a result of an injunction, restraining order or abatement order issued under this section.

(5) A case filed under this section shall be given preference on the docket over all other civil cases except those given an equal preference by statute.

(6) In any action brought under this section, the plaintiff may seek and the court may award a sum of money sufficient to compensate the public for any destruction or infringement of any public right of navigation, fishery or recreation resulting from an existing public nuisance under ORS 196.855. Any money received by the plaintiff under this subsection shall be deposited in the Common School Fund. [Formerly 541.660 and then 196.735]

196.875 Double and treble damages for destruction of public right of navigation, fishery or recreation; costs and attorney fees. (1) If any person or governmental body, through negligence, violates ORS 196.810, the director, in a proceeding brought pursuant to ORS 196.870, may seek and the court may award double a sum of money sufficient to compensate the public for any destruction or infringement of any public right of navigation, fishery or recreation resulting from such violation.

(2) If any person or governmental body intentionally violates ORS 196.810, the director, in a proceeding brought pursuant to ORS 196.870, may seek and the court may award treble a sum of money sufficient to compensate the public for any destruction or in-

fringement of any public right of navigation, fishery or recreation resulting from such violation.

(3) An award made pursuant to this section shall be in addition to and not in lieu of any criminal penalties imposed for a violation of ORS 196.810.

(4) In any action brought under ORS 196.870, the court shall award to the prevailing party the costs of suit and reasonable attorney fees at trial and on appeal. Subject to the provisions of ORS 20.140, any costs and attorney fees so awarded to the director shall be deposited in the Common School Fund to offset the director's expenses of bringing such action. [Formerly 541.662 and then 196.740]

Note: 196.875 [formerly 541.662 and 196.740] was enacted by two identical provisions, section 10 of chapter 330 and section 13 of chapter 674, Oregon Laws 1973. Both are compiled as a single section.

196.880 Fill under permit presumed not to affect public rights; public rights extinguished. If the director issues a permit to fill pursuant to ORS 196.600 to 196.665 and 196.800 to 196.900, it shall be presumed that such fill does not infringe upon the public rights of navigation, fishery or recreation, and the public rights to lands created by the fill shall be considered extinguished. [Formerly 541.665 and then 196.745]

196.885 Annual report of fill and removal activities; contents of report. The director shall submit an annual report to the State Land Board on the activities conducted under ORS 196.600 to 196.665 and 196.800 to 196.900. The annual report shall include the following:

(1) The number of fill and removal permits applied for, denied and granted, organized according to whether or not the permits were for waters subject to section 404 of the Federal Water Pollution Control Act (P.L. 92-500, as amended). For all permits granted or outstanding during the prior year, a separate summary shall be included for fills and removals, organized by river or other water body, that shows:

(a) The total number of permits, the number of new permits and the number of renewal permits.

(b) The volume and acreage of fills and removals authorized during the past year, and the volume and acreage of fills and removals completed during the past year.

(2) By river or other water body, a summary of the total volume and acreage of fills and removals made under a general waiver, general permit or similar authority.

(3) A summary of mitigation measures, including a description of each mitigation project approved during the past year including the location and size of each miti-

gation project and a report on the status of all mitigation projects pending or completed during the past year.

(4) A summary of enforcement activities, including:

(a) The number of potential violations reported.

(b) The number of compliance investigations conducted.

(c) The results of compliance actions, including:

(A) The number of cases resolved by voluntary compliance, administrative hearings and judicial enforcement proceedings;

(B) The amount of damages and penalties assessed;

(C) The amount of damages and penalties recovered; and

(D) A brief description of each after-the-fact permit issued, including the location and size by volume and acreage.

(5) A description of staffing, including the number of full-time equivalent positions devoted to the permit program and, for each position, the qualifications and job description.

(6) The report on the Oregon Wetlands Mitigation Bank Revolving Fund Account as required under ORS 196.655.

(7) The number of and average time for responding to notices received by local governments and the number of responses that took more than 30 days.

(8) The number of wetland conservation plans approved by the director and a description of each, including the issues raised during the approval process. [Formerly 541.670 and then 196.750]

196.890 Civil penalties. Any person who violates any provision of ORS 196.600 to 196.665 and 196.800 to 196.900 or any rule, order or permit adopted or issued under ORS 196.600 to 196.665 and 196.800 to 196.900 shall be subject to a civil penalty in an amount to be determined by the director of not more than \$10,000 per day of violation. [Formerly 541.675 and then 196.755]

196.895 Procedures for civil penalties.

(1) Any civil penalty imposed under ORS 196.890 shall become due and payable when the person incurring the penalty receives a notice in writing from the director. The notice referred to in this section shall be sent by registered or certified mail and shall include:

(a) A reference to the particular sections of the statute, rule, order or permit involved;

(b) A short and plain statement of the matters asserted or charged;

(c) A statement of the amount of the

penalty imposed; and

(d) A statement of the party's right to request a hearing within 20 days of receiving the notice.

(2) The person to whom the notice is addressed shall have 20 days from the date of personal service or mailing of the notice in which to make a written request for a hearing.

(3) Hearings shall be conducted under the provisions of ORS 183.310 to 183.550 applicable to contested cases. If no hearing is requested or if the party requesting a hearing fails to appear, a final order shall be entered upon a prima facie case made on the record of the agency.

(4) Unless the amount of penalty is paid within 10 days after the order becomes final, the order shall constitute a judgment and may be recorded with the county clerk in any county of this state. The clerk shall record the name of the person incurring the penalty and the amount of the penalty in the County Clerk Lien Record. The penalty provided in the order so recorded becomes a lien upon the title to any interest in real property situated in the county and owned by the person against whom the order is entered. Execution may be issued upon the order in the same manner as execution upon a judgment of a court of record.

(5) The provisions of this section are in addition to and not in lieu of any other penalty or sanction provided by law. An action taken by the director under this section may be joined by the director with any other action taken against the same person under ORS 196.860 (1)(f).

(6) Any civil penalty recovered under this section shall be deposited in the Common School Fund for use by the division in administration of ORS 196.600 to 196.665, 196.800 to 196.900, 196.990 and 541.990 and as otherwise required by law. [Formerly 541.680 and then 196.760]

196.900 Schedule of civil penalties; factors to be considered in imposing civil penalties. (1) The director shall adopt by rule the amount of civil penalty that may be imposed for a particular violation.

(2) In imposing a penalty under the schedule adopted under subsection (1) of this section, the director shall consider the following factors:

(a) The past history of the person incurring a penalty in taking all feasible steps or procedures necessary or appropriate to correct any violation.

(b) Any prior violations of statutes, rules, orders and permits pertaining to waters of the state.

(c) The impact of the violation on public interests in fishery, navigation and recreation.

(d) Any other factors determined by the director to be relevant and consistent with the policy of ORS 196.805.

(3) The penalty imposed under this section may be remitted or mitigated upon such terms and conditions as the director determines to be proper and consistent with the policy of ORS 196.805. Upon the request of the person incurring the penalty, the director shall consider evidence of the economic and financial condition of the person in determining whether a penalty shall be remitted or mitigated. [Formerly 541.685 and then 196.765]

196.905 Application of ORS 196.600 to 196.665 and 196.800 to 196.900. (1) Nothing in ORS 196.600 to 196.665 and 196.800 to 196.900 applies to filling the beds of the waters of this state for the purpose of constructing, operating and maintaining dams or other diversions for which permits or certificates have been or shall be issued under ORS chapter 537 or 539 and for which preliminary permits or licenses have been or shall be issued under ORS 543.010 to 543.620.

(2) Nothing in ORS 196.600 to 196.665 and 196.800 to 196.900 applies to removal of materials from the beds or banks or filling of the waters of a nonnavigable natural waterway, or any portion thereof, in this state, if:

(a) Such waterway or portion is situated within forest land; and

(b) Such removal or filling is directly connected with a forest management practice conducted in accordance with ORS 527.610 to 527.735, 527.990 and 527.992.

(3) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for the following activities on converted wetlands:

(a) Normal farming and ranching activities such as plowing, grazing, seeding, cultivating, conventional crop rotation, harvesting for the production of food and fiber, upland soil and water conservation practices or reestablishment of crops under federal conservation reserve program provisions; or

(b) Minor drainage within an established farm operation as defined by rule.

(4) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for the following activities on exclusive farm use zoned lands:

(a) Drainage or maintenance of farm or stock ponds; and

(b) Maintenance of farm roads in such a manner as to not significantly adversely affect wetlands.

(5) The exemption in subsections (3) and (4) of this section shall not apply to any fill or removal which involves changing an area of wetlands to a nonfarm use.

(6) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for the maintenance or reconstruction of structures such as dikes, dams, levees, groins, riprap, tidegates, drainage ditches, irrigation ditches and tile drain systems, provided that:

(a) The structure was serviceable within the past five years; and

(b) Such maintenance or reconstruction would not significantly adversely affect wetlands that existed at the time that the structure was in good repair other than those wetlands that were significantly adversely affected as a result of the original construction of those structures.

(7) Notwithstanding the provisions of subsection (6) of this section, any dike, dam, levee, groin, riprap, tidegate, drainage ditch, irrigation ditch or tile drainage system that was serviceable on or after January 1, 1980, shall be permitted to be reconstructed without permit, provided that:

(a) Such reconstruction is completed prior to December 31, 1991; and

(b) Such maintenance or reconstruction would not significantly adversely affect wetlands that existed at the time that the structure was in good repair.

(8) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable roads or transportation structures such as groins and riprap protecting roads, causeways and bridge abutments or approaches.

(9) For the purposes of this section, "converted wetland" means:

(a) Wetlands that on or before June 30, 1989, have been diked, drained, dredged, filled or leveled and are capable of producing an agricultural commodity where such production would not have been possible but for such action; or

(b) Wetlands that have been otherwise manipulated by any activity that results in impairing or reducing the flow, circulation or reach of water that has the effect of significantly adversely affecting wetland values and is capable of producing an agricultural commodity where such production would not have been possible but for such action. [Formerly 541.695 and then 196.770]

PENALTIES

196.990 Penalties. Violation of ORS 196.810 is a misdemeanor. [Formerly subsection (4) of 541.990]

Scenic Waterways

SCENIC WATERWAYS

390.805 Definitions for ORS 390.805 to 390.925. As used in ORS 390.805 to 390.925, unless the context requires otherwise:

(1) "Department" means the State Parks and Recreation Department.

(2) "Scenic waterway" means Waldo Lake, river or segment of river that has been designated as such in accordance with ORS 390.805 to 390.925 or any subsequent Act, and includes related adjacent land.

(3) "Related adjacent land" means all land within one-fourth of one mile of the bank on the side of Waldo Lake, river or segment of river within a scenic waterway, except land that, in the department's judgment, does not affect the view from the waters within a scenic waterway.

(4) "Scenic easement" means the right to control the use of related adjacent land, including air space above such land, for the purpose of protecting the scenic view from waters within a scenic waterway; but such control does not affect, without the owner's consent, any regular use exercised prior to the acquisition of the easement, and the landowner retains the right to uses of the land not specifically restricted by the easement. [1971 c.1 §2; 1981 c.787 §55; 1983 c.334 §1; 1983 c.642 §10; 1989 c.904 §25]

390.815 Policy; establishment of system. The people of Oregon find that many of the free-flowing rivers of Oregon and Waldo Lake and lands adjacent to such lake and rivers possess outstanding scenic, fish, wildlife, geological, botanical, historic, archeologic, and outdoor recreation values of present and future benefit to the public. The people of Oregon also find that the policy of permitting construction of dams and other impoundment facilities at appropriate sections of the rivers of Oregon and Waldo Lake needs to be complemented by a policy that would preserve Waldo Lake and selected rivers or sections thereof in a free-flowing condition and would protect and preserve the natural setting and water quality of the lake and such rivers and fulfill other conservation purposes. It is therefore the policy of Oregon to preserve for the benefit of the public Waldo Lake and selected parts of the state's free-flowing rivers. For these purposes there is established an Oregon Scenic Waterways System to be composed of areas designated in accordance with ORS 390.805 to 390.925 and any subsequent Acts. [1971 c.1 §1; 1983 c.334 §2]

390.825 [1971 c.1 §3; 1975 c.612 §1; 1977 c.671 §1; 1983 c.334 §3; 1985 c.781 §§1, 2; 1987 c.291 §1; repealed by 1989 c.2 §1 (390.826 enacted in lieu of 390.825)]

390.826 Designated scenic waterways. The following lakes and rivers, or segments of rivers, and related adjacent land are designated as scenic waterways:

(1) The Metolius Scenic Waterway which includes the Metolius River from Metolius Springs downstream to its confluence with Candle Creek.

(2) The Klamath Scenic Waterway which includes the Klamath River from the John Boyle Dam powerhouse downstream to the Oregon-California border.

(3) The Clackamas Scenic Waterway which includes:

(a) The segments of the Clackamas River from the boundary of the Olallie Lake Scenic Area, as constituted on December 8, 1988, downstream to the North Fork Reservoir, and from immediately below the River Mill Dam downstream to the bridge at Carver;

(b) The South Fork Clackamas River from its confluence with an unnamed tributary near the western boundary of Section 7, Township 5 South, Range 5 East, Willamette Meridian, downstream to the confluence of the South Fork Clackamas River with the Clackamas River; and

(c) The North Fork Clackamas River from its source downstream to the North Fork Reservoir.

(4) The McKenzie Scenic Waterway which includes:

(a) The segments of the McKenzie River from Clear Lake downstream to Carmen Reservoir, from Tamolitch Falls downstream to Trail Bridge Reservoir and from Trail Bridge Dam downstream to Paradise Campground; and

(b) The segments of the South Fork McKenzie River from the boundary of the Three Sisters Wilderness, as constituted on December 8, 1988, downstream to Cougar Reservoir, and from immediately below Cougar Dam downstream to its confluence with the McKenzie River.

(5) The Deschutes Scenic Waterway which includes the segments of the Deschutes River from Little Lava Lake downstream to Crane Prairie Reservoir, from the gaging station immediately below Wickiup Dam downstream to General Patch Bridge, from Harper Bridge downstream to the Central Oregon Irrigation District's diversion structure (near river mile 171), from Robert Sawyer Park downstream to Tumalo State Park, from Deschutes Market Road Bridge downstream to Lake Billy Chinook Reservoir (excluding the Cline Falls hydro-

electric facility near river mile 145), and from immediately below the existing Pelton reregulating dam downstream to the confluence of the Deschutes River with the Columbia River, excluding the City of Maupin as its boundaries are constituted on October 4, 1977.

(6) The Santiam Scenic Waterway which includes the Little North Fork of the Santiam River from the confluence of Battle Ax Creek and Opal Creek downstream to the boundary of the Willamette National Forest, as constituted on September 20, 1985.

(7) The John Day Scenic Waterway which includes:

(a) The John Day River from its confluence with Parrish Creek downstream to Tumwater Falls;

(b) The North Fork John Day River from the boundary of the North Fork John Day Wilderness (near river mile 76), as constituted on December 8, 1988, downstream to the northern boundary of the south one-half of Section 20, Township 8 South, Range 28 East, Willamette Meridian;

(c) The Middle Fork John Day River from its confluence with Crawford Creek (near river mile 71) downstream to the confluence of the Middle Fork John Day River with the North Fork John Day River; and

(d) The South Fork John Day River from the Post-Paulina road crossing (near river mile 35) downstream to the northern boundary of the Murderer's Creek Wildlife Area, as constituted on December 8, 1988 (near river mile 6).

(8) The Illinois Scenic Waterway which includes the Illinois River from its confluence with Deer Creek downstream to its confluence with the Rogue River.

(9) The Rogue Scenic Waterway which includes the segments of the Rogue River from the boundary of Crater Lake National Park, as constituted on December 8, 1988, downstream to the boundary of the Rogue River National Forest, as constituted on December 8, 1988 (near river mile 173), and from the confluence of the Rogue River with the Applegate River downstream to Lobster Creek Bridge.*

(10) The Umpqua Scenic Waterway which includes the segments of the North Umpqua River from the boundary of the Mt. Thielsen Wilderness, as constituted on December 8, 1988, downstream to Lemolo Reservoir, and from the Soda Springs Dam powerhouse downstream to its confluence with Rock Creek (near Idleld Park).

(11) The Nestucca Scenic Waterway which includes:

(a) The Nestucca River from immediately

below the McGuire Dam downstream to its confluence with East Creek (near Blaine); and

(b) Walker Creek from its source downstream to its confluence with the Nestucca River.

(12) The Wallowa-Grande Ronde Scenic Waterway which includes:

(a) The Grande Ronde River from its confluence with the Wallowa River downstream to the Oregon-Washington border; and

(b) The Wallowa River from its confluence with the Minam River downstream to the confluence of the Wallowa River with the Grande Ronde River.

(13) The Minam Scenic Waterway which includes the Minam River from Minam Lake downstream to its confluence with the Wallowa River.

(14) The Elk Scenic Waterway which includes:

(a) The Elk River from the confluence of the North Fork Elk River and South Fork Elk River downstream to the Elk River fish hatchery;

(b) The North Fork Elk River from its source downstream to its confluence with the South Fork Elk River; and

(c) The South Fork Elk River from its source downstream to its confluence with the North Fork Elk River.

(15) The Owyhee Scenic Waterway which includes:

(a) The South Fork Owyhee River from the Oregon-Idaho border downstream to Three Forks; and

(b) The Owyhee River from Crooked Creek (near river mile 118) downstream to the mouth of Birch Creek (near river mile 76).

(16) The North Fork of the Middle Fork Willamette Scenic Waterway which includes the North Fork of the Middle Fork Willamette River from Waldo Lake downstream to a point one mile upstream from the railroad bridge near the town of Westfir.

(17) The Waldo Lake Scenic Waterway which includes Waldo Lake in Lane County. [1989 c.2 §2 (enacted in lieu of 390.825)]

Included by Administrative Rule (OAR 736-40-010 (7)) The segment of the Sandy River from the east boundary line of Section 25 and Section 36, T1S, R4E, W.M., in Clackamas County at Dodge Park, downstream approximately 12.5 miles to the west line of the east half of the Northeast quarter of Section 6, T1S, R4E, W.M., in Multnomah County at Dabney State Park.

* The confluence of the Rogue and Applegate Rivers is defined as the west boundary line of the east 1/2 of the east 1/2 of Section 19, T36S, R6W, W.M., in Josephine County (OAR 737-40-010(8)).

390.827 Effect of ORS 390.826 on rights of Indian tribes. Nothing in ORS 390.826 shall:

(1) Affect or modify any treaty or other rights of any Indian tribe; or

(2) Affect lands held in trust by the Secretary of the Interior for Indian tribes or individual members of Indian tribes or other lands acquired by the Army Corps of Engineers and administered by the Secretary of the Interior for the benefit of Indian tribes and individual members of Indian tribes. [1989 c.2 §3]

Note: 390.827 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 390 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

390.835 Highest and best use of waters within scenic waterways; authority of State Fish and Wildlife Commission, Water Resources Commission, Division of State Lands and State Land Board. (1) It is declared that the highest and best uses of the waters within scenic waterways are recreation, fish and wildlife uses. The free-flowing character of these waters shall be maintained in quantities necessary for recreation, fish and wildlife uses. No dam, or reservoir, or other water impoundment facility shall be constructed or placer mining permitted on waters within scenic waterways. No water diversion facility shall be constructed or used except by right previously established or as permitted by the Water Resources Commission, upon a finding that such diversion is necessary to uses designated in ORS 536.310 (12), and in a manner consistent with the policies set forth under ORS 390.805 to 390.925. The Water Resources Commission shall administer and enforce the provisions of this subsection.

(2) Filling of the beds or removal of material from or other alteration of the beds or banks of scenic waterways shall be prohibited, except as permitted by the Director of the Division of State Lands upon a finding that such activity would be consistent with the policies set forth under ORS 390.805 to 390.925 for scenic waterways, and approved by the State Land Board and in a manner consistent with the policies set forth under ORS 196.800 to 196.825 and 196.840 to 196.870 for removal of material from the beds and banks and filling of any waters of this state. The Director of the Division of State Lands shall administer and enforce the provisions of this subsection.

(3)(a) Upon a finding of emergency circumstances, the Director of the Division of State Lands may issue a temporary permit for the removal, filling or alteration of the beds or banks within a scenic waterway prior to approval by the State Land Board under

subsection (2) of this section. The temporary permit shall include conditions developed after consultation with the State Department of Fish and Wildlife and the State Parks and Recreation Department. A temporary permit approved by the Director of the Division of State Lands shall be reviewed by the State Land Board at its next regularly scheduled meeting following the emergency approval. Upon its review, the State Land Board may approve, modify or revoke the permit.

(b) As used in this subsection, "emergency circumstances" exist if the activity is necessary to make repairs or to prevent irreparable harm, injury or damage to persons or property.

(4) Nothing in ORS 390.805 to 390.925 affects the authority of the State Fish and Wildlife Commission to construct facilities or make improvements to facilitate the passage or propagation of fish or to exercise other responsibilities in managing fish and wildlife resources. Nothing in ORS 390.805 to 390.925 affects the authority of the Water Resources Commission to construct and maintain stream gauge stations and other facilities related to the commission's duties in administration of the water laws.

(5) The Water Resources Commission shall carry out its responsibilities under ORS 536.220 to 536.590 with respect to the waters within scenic waterways in conformity with the provisions of this section. [1971 c.1 §4; 1973 c.756 §1; 1977 c.671 §2; 1985 c.673 §177; 1989 c.320 §1]

390.845 Functions of the department; use of adjacent lands. (1) Except as provided in ORS 390.835, scenic waterways shall be administered by the department, each in such manner as to protect and enhance the values which caused such scenic waterway to be included in the system. In such administration primary emphasis shall be given to protecting the esthetic, scenic, fish and wildlife, scientific and recreation features, based on the special attributes of each area.

(2) After consultation with the State Board of Forestry, the State Department of Agriculture and the affected counties and with the concurrence of the Water Resources Commission, the department shall adopt rules governing the management of related adjacent land. Such rules shall be adopted in accordance with ORS 183.310 to 183.550. Such rules shall reflect management principles, standards and plans applicable to scenic waterways, their shore lines and related adjacent land and, if necessary, establish varying intensities of protection or development based on special attributes of each area. Such management principles, standards and plans shall protect or enhance the esthetic and scenic values of the scenic waterways and permit compatible agricultural, forestry

and other land uses. Specifically, and not in limitation of the foregoing, such rules shall provide that:

(a) No roads, railroads or utilities shall be constructed within any scenic waterway except where necessary to serve the permissible uses, as defined in subsection (2) of this section and in the rules of the department, of the related adjacent land or unless department approval of such use is obtained as provided in subsection (4) or (5) of this section. The department wherever practicable shall require the sharing of land and air space by such roads, railroads and utilities. All permissible roads, railroads and utilities shall be located in such a manner as to minimize the disturbance of the natural beauty of a scenic waterway;

(b) Forest crops shall be harvested in such manner as to maintain as nearly as reasonably is practicable the natural beauty of the scenic waterway;

(c) Occupants of related adjacent land shall avoid pollution of waters within a scenic waterway;

(d) The surface of related adjacent land shall not be disturbed for prospecting or mining unless the department's approval is obtained under subsection (4) or (5) of this section; and

(e) Unless department approval of the proposed use is obtained under subsection (4) or (5) of this section, no commercial, business or industrial structures or buildings other than structures or buildings erected in connection with an existing use shall be erected or placed on related adjacent land. All structures and buildings erected or placed on such land shall be in harmony with the natural beauty of the scenic waterway and shall be placed a sufficient distance from other structures or buildings so as not to impair substantially such natural beauty. No signs or other forms of outdoor advertising that are visible from waters within a scenic waterway shall be constructed or maintained.

(3) No person shall put related adjacent land to uses that violate ORS 390.805 to 390.925 or the rules of the department adopted under ORS 390.805 to 390.925 or to uses to which the land was not being put before December 3, 1970, or engage in the cutting of trees, or mining, or prospecting on such lands or construct roads, railroads, utilities, buildings or other structures on such lands, unless the owner of the land has given to the department written notice of such proposed use at least one year prior thereto and has submitted to the department with the notice a specific and detailed description of such proposed use or has entered

into agreement for such use with the department under subsection (5) of this section. The owner may, however, act in emergencies without the notice required by ORS 390.805 to 390.925 when necessary in the interests of public safety.

(4) Upon receipt of the written notice provided in subsection (3) of this section, the department shall first determine whether in its judgment the proposed use would impair substantially the natural beauty of a scenic waterway. If the department determines that the proposal, if put into effect, would not impair substantially the natural beauty of the scenic waterway, the department shall notify in writing the owner of the related adjacent land that the owner may immediately proceed with the proposed use as described to the department. If the department determines that the proposal, if put into effect, would impair substantially the natural beauty of the scenic waterway, the department shall notify in writing the owner of the related adjacent land of such determination and no steps shall be taken to carry out such proposal until at least one year after the original notice to the department. During such period:

(a) The department and the owner of the land involved may agree upon modifications or alterations of the proposal so that implementation thereof would not in the judgment of the department impair substantially the natural beauty of the scenic waterway; or

(b) The department may acquire by purchase, gift or exchange, the land involved or interests therein, including scenic easements, for the purpose of preserving the natural beauty of the scenic waterway.

(5) The department, upon written request from an owner of related adjacent land, shall enter into negotiations and endeavor to reach agreement with such owner establishing for the use of such land a plan that would not impair substantially the natural beauty of the scenic waterway. At the time of such request for negotiations, the owner may submit a plan in writing setting forth in detail proposed uses. Three months after the owner makes such a request for negotiations with respect to use of land, either the department or the owner may give written notice that the negotiations are terminated without agreement. Nine months after the notice of termination of negotiations the owner may use land in conformity with any specific written plan submitted by the owner prior to or during negotiations. In the event the department and the owner reach agreement establishing a plan for land use, such agreement is terminable upon at least one year's written notice by either the department or the owner.

(6) With the concurrence of the Water Resources Commission, the department may institute condemnation proceedings and by condemnation acquire related adjacent land:

(a) At any time subsequent to nine months after the receipt of notice of a proposal for the use of such land that the department determines would, if carried out, impair substantially the natural beauty of a scenic waterway unless the department and the owner of such land have entered into an agreement as contemplated by subsection (4) or (5) of this section or the owner shall have notified the department of the abandonment of such proposal; or

(b) At any time related adjacent land is used in a manner violating ORS 390.805 to 390.925, the rules of the department or any agreement entered into by the department pursuant to subsection (4) or (5) of this section; or

(c) At any time related adjacent land is used in a manner which, in the judgment of the department, impairs substantially the natural beauty of a scenic waterway, if the department has not been given at least one year's advance written notice of such use and if there is not in effect department approval of such use pursuant to subsection (4) or (5) of this section.

(7) In such condemnation the owner of the land shall not receive any award for the value of any structure, utility, road or other improvement constructed or erected upon the land after December 3, 1970, unless the department has received written notice of such proposed structure, utility, road or other improvement at least one year prior to commencement of construction or erection of such structure, utility, road or other improvement or unless the department has given approval for such improvement under subsection (4) or (5) of this section. If the person owned the land on December 3, 1970, and for a continuous period of not less than two years immediately prior thereto, the person shall receive no less for the land than its value on December 3, 1970. The department shall not acquire by condemnation a scenic easement in land. When the department acquires any related adjacent land that is located between a lake or river and other land that is owned by a person having the right to the beneficial use of waters in the river by virtue of ownership of the other land:

(a) The right to the beneficial use of such waters shall not be affected by such condemnation; and

(b) The owner of the other land shall retain a right of access to the lake or river necessary to use, store or divert such waters as the owner has a right to use, consistent

with concurrent use of the land so condemned as a part of the Oregon Scenic Waterways System.

(8) Any owner of related adjacent land, upon written request to the department, shall be provided copies of rules then in effect or thereafter adopted by the department pursuant to ORS 390.805 to 390.925.

(9) The department shall furnish to any member of the public upon written request and at expense of the member a copy of any notice filed pursuant to subsection (3) of this section.

(10) If a scenic waterway contains lands or interests therein owned by or under the jurisdiction of an Indian tribe, the United States, another state agency or local governmental agency, the department may enter into agreement with the tribe or the federal, state or local agency for the administration of such lands or interests therein in furtherance of the purposes of ORS 390.805 to 390.925. (1971 c.1 §5; 1971 c.459 §1; 1973 c.756 §2; 1981 c.236 §3; 1983 c.334 §4)

390.848 Passes for use of parts of Deschutes River; fee; exemption from fee; disposition of moneys. (1) The department shall establish, by rule, a system for issuing passes necessary to comply with the requirements under ORS 390.851. The department shall establish a reasonable fee for issuance of a pass under this section. The department may establish any form of proof of payment of the user fees that it deems appropriate.

(2) The system for issuance of passes established by the department under this section may include issuance of the passes by governmental entities or private persons who have entered into appropriate agreements with the department for issuance of the passes. Agreements under this subsection may include, but are not limited to, terms providing for locations for the collection of fees, methods the department determines appropriate to assure payment of moneys collected and provisions for the distribution of river-user information.

(3) The department shall issue, without charge, annual passes to comply with the requirements under ORS 390.851 to persons who own ranch, farm or residential property immediately abutting those portions of the Deschutes River designated as scenic waterways under ORS 390.826 and to members of the immediate family of such persons. This subsection does not authorize the issuance without charge of passes to persons holding less than a majority interest in a firm, corporation or cooperative organization which owns land immediately abutting the Deschutes River designated as scenic waterways under ORS 390.826.

(4) Moneys collected under this section shall be deposited in the separate fund established for the State Parks and Recreation Department under ORS 366.512 and, subject to the limitations under subsection (5) of this section, are continually appropriated to that department to be used:

(a) For operation of the pass system established under this section;

(b) For providing river-user oriented law enforcement services;

(c) For providing river recreation information and education;

(d) For developing and maintaining river oriented recreation facilities; and

(e) For any other purposes the department considers appropriate for the maintenance, enhancement or protection of the natural and scenic beauty of the scenic waterway consistent with ORS 390.805 to 390.925.

(5) The use of moneys for purposes described under subsection (4) of this section is limited to the performance of those purposes for areas of the Deschutes River designated as scenic waterways under ORS 390.826. [1981 c.798 §2; 1985 c.606 §4; 1987 c.291 §2; 1987 c.624 §15]

390.851 Activities prohibited on parts of Deschutes River without pass; exceptions. (1) Unless the person has an appropriate pass issued under ORS 390.848, no person shall launch, operate or ride in any boat or engage in any camping, fishing or other activity in connection with being transported by a boat on those portions of the Deschutes River designated as scenic waterways under ORS 390.826.

(2) This section does not apply to:

(a) Peace officers, members or employees of a governmental body or their agents while engaged in the discharge of official duties; or

(b) Any member of the Confederated Tribes of the Warm Springs Indian Reservation.

(3) A person who violates this section commits a Class B parks and recreation infraction. [1981 c.798 §3; 1987 c.291 §3]

390.855 Designation of additional scenic waterways. The department shall undertake a continuing study and submit periodic reports to the Governor, with the concurrence of the Water Resources Commission, recommending the designation of additional rivers or segments of rivers and related adjacent land by the Governor as scenic waterways subject to the provisions of ORS 390.805 to 390.925. Consistent with such recommendation, the Governor may

designate any river or segment of a river and related adjacent land as a scenic waterway subject to the provisions of ORS 390.805 to 390.925. The department shall consult with the State Fish and Wildlife Commission, the State Department of Agriculture, the Environmental Quality Commission, the Division of State Lands, and such other persons or agencies as it considers appropriate. The State Parks and Recreation Department shall conduct hearings in the counties in which the proposed additional rivers or segments of rivers are located. The following criteria shall be considered in making such report:

(1) The river or segment of river is relatively free-flowing and the scene as viewed from the river and related adjacent land is pleasing, whether primitive or rural-pastoral, or these conditions are restorable.

(2) The river or segment of river and its setting possess natural and recreation values of outstanding quality.

(3) The river or segment of river and its setting are large enough to sustain substantial recreation use and to accommodate existing uses without undue impairment of the natural values of the resource or quality of the recreation experience. [1971 c.1 §6]

390.865 Authority of legislature over designation of additional scenic waterways. The designation of a river or segment of a river and related adjacent land, pursuant to ORS 390.855, shall not become effective until the day following the adjournment sine die of the regular session of the Legislative Assembly next following the date of the designation or that was in session when the designation was made. The Legislative Assembly by joint resolution may disapprove any such designation or a part thereof, and in that event the designation, or part thereof so disapproved, shall not become effective. [1971 c.1 §7]

390.875 Transfer of public lands in scenic waterways to department; administration of nontransferred lands. Any public land within or adjacent to a scenic waterway, with the consent of the governing body having jurisdiction thereof, may be transferred to the jurisdiction of the department with or without compensation. Any land so transferred shall become state recreational land and shall be administered as a part of the scenic waterway. Any such land within a scenic waterway which is not transferred to the jurisdiction of the department, to the fullest extent consistent with the purposes for which the land is held, shall be administered by the body having jurisdiction thereof in accordance with the provisions of ORS 390.805 to 390.925. [1971 c.1 §8]

390.885 Exchange of property within scenic waterway for property outside waterway. In acquiring related adjacent land by exchange, the department may accept title to any property within a scenic waterway, and in exchange therefor, may convey to the grantor of such property any property under its jurisdiction that the department is not otherwise restricted from exchanging. In so far as practicable, the properties so exchanged shall be of approximately equal fair market value. If they are not of approximately equal fair market value, the department may accept cash or property from, or pay cash or grant property to, the grantor in order to equalize the values of the properties exchanged. [1971 c.1 §9]

390.895 Use of federal funds. In addition to State of Oregon funds available for the purposes of ORS 390.805 to 390.925, the department shall use such portion of moneys made available to it by the Bureau of Outdoor Recreation and other federal agencies, including matching funds, as the department determines are necessary and available to carry out the purposes of ORS 390.805 to 390.925. [1971 c.1 §10]

390.905 Effect of ORS 390.805 to 390.925 on other state agencies. Nothing in ORS 390.805 to 390.925 affects the jurisdiction or responsibility of other state agencies with respect to boating, fishing, hunting, water pollution, health or fire control; except that such state agencies shall endeavor to perform their responsibilities in a manner consistent with the purposes of ORS 390.805 to 390.925. [1971 c.1 §11]

390.910 Intergovernmental cooperation; county representative on management advisory committee. In carrying out the provisions of ORS 390.805 to 390.925, the department may enter into intergovernmental agreements to form committees to advise the various governmental agencies involved regarding management of the scenic waterways. Each such agreement must provide for membership on the committee of a representative of one of the governing bodies of the counties through which the scenic waterway flows. The county representative shall be chosen by the Governor from among those individuals recommended to the Governor by the county governing bodies. [1981 c.236 §2]

390.915 Determination of value of scenic easement for tax purposes; easement exempt. For ad valorem tax purposes, real property that is subject to a scenic easement shall be valued at its true cash value, less any reduction in value caused by the scenic easement, and assessed in accordance with ORS 308.232. The easement shall be exempt from assessment and taxation the same as any other property owned by the state. [1971 c.1 §12; 1981 c.804 §99]

390.925 Enforcement. In addition to any other penalties provided by law for violation of ORS 390.805 to 390.925 or rules adopted thereunder, the department is vested with power to obtain injunctions and other appropriate relief against violations of any provisions of ORS 390.805 to 390.925 and any rules adopted under ORS 390.805 to 390.925 and agreements made under ORS 390.805 to 390.925. [1971 c.1 §13; 1981 c.798 §6]